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IN THE
Supreme Court of the United States
October Term, 1995

Estate of Diane Montag, by and through Michael Montag,
the Personal Representative of the Estate, and
Michael Montag, individually,
Petitioners,

v.

American Honda Motor Company, Inc.,
Honda Motor Company, Ltd., a Japanese corporation, and
Honda R & D Co., Ltd., a Japanese corporation,
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the United States Court of Appeals for the Tenth Circuit err by holding—in direct conflict with several other federal circuits and state courts of last resort—that Honda's compliance with a Federal motor vehicle safety standard effectively exempted Honda from liability at common law, even though the National Traffic and Motor Vehicle Safety Act of 1966 expressly provides that "[c]ompliance with any Federal motor vehicle safety standard . . . does not exempt any person from any liability under common law."

PARTIES TO THE PROCEEDING

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No. 95-____

IN THE
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Estate of Diane Montag, by and through Michael Montag,
the Personal Representative of the Estate, and
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American Honda Motor Company, Inc.,
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Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Estate of Diane Montag, and Michael Montag, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in this case is reported as *The Estate of Diane Montag v. American Honda Motor Company, Inc.*, 75 F.3d 1414 (10th Cir. 1996), and reprinted in the Appendix hereto at 10a - 26a. The ruling of the trial court with regard to the preemption issues is reported as *The Estate of Diane Montag v. Honda Motor Company, Ltd.*, 856 F.Supp. 574 (D. Colo. 1994), and reprinted in the Appendix hereto at 1a - 9a.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit on the issues presented by this Petition was entered on January 22, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

15 U.S.C. § 1392(d)[1] provides:

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[1]The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381, *et seq.*, along with other statutes governing transportation, were recently recodified "without substantive change." Pub. L. No. 103-272, § 1(a), 108 Stat. 745 (1994). As a result, what was 15 U.S.C. § 1392(d) is now 49 U.S.C. § 30103(b). All of the applicable preemption cases, including the decisions of the two courts below, discuss the provisions as codified before the 1994 recodification. For convenience, this Petition uses the citations employed in those decisions.

(d) Supremacy of Federal Standards: allowable higher standards for vehicles used by Federal or State governments.

Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

15 U.S.C. § 1397(b)[2] provides:

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[2]Now 49 U.S.C. § 30103(e).

(k) Continuation of common law liability.

Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

STATEMENT OF THE CASE

On June 22, 1990, at approximately 8:15 a.m., a train traveling approximately 30 miles per hour hit the left rear wheel of the 1988 Honda Prelude that Diane Montag was driving. The force of the crash prompted the car's door to pop open and, since the car's safety belt was attached to the door, it simply released Mrs. Montag. She was ejected from the car and sustained injuries which ultimately resulted in her death.

Petitioners then filed this lawsuit for damages in the Federal Court for the District of Colorado against the Respondents (collectively "Honda"), on theories of strict product liability and negligence. The Complaint alleged that, but for Honda's negligence and/or defective design, Diane Montag would not have been ejected from the vehicle and would not have sustained the injuries which ultimately led to her death.

During the course of discovery, Honda produced various internal documents and engineering studies related to its efforts to select a passive restraint system to meet the minimum requirements of Federal motor vehicle safety standard 208. Standard 208 required certain crash performance requirements be met without action being required on the part

of the driver or passenger of the vehicle. These requirements could be met by means of padding, airbags, and/or "automatic seatbelts."

The documents produced by Honda compared and contrasted various alternatives and showed that, although Honda believed that the safest and most effective system was a manual 3-point *body-mounted* safety belt with an airbag, it settled on the least expensive system: a 3-point *door mounted* safety belt system without an airbag. As this accident demonstrates, a 3-point door mounted system will not keep the driver in place if the door opens during a crash.

These documents were authored by Kazou Higuchi (one of two Deputy Large Project Leaders of Honda's project to select passive restraints to meet Standard 208) and Noboru Hashimoto (Member of the Board of Directors of Honda R&D, Ltd., and the Large Project Leader of the Honda project to select passive restraints to meet Standard 208). When those individuals' videotaped depositions were taken, both witnesses acknowledged that, according to the documents they had authored, the safest, most effective, and best passive restraint system consisted of a manual 3-point safety belt, connected directly to the body of the car, and an airbag.

Honda had previously allowed the district court's deadline for filing motions raising the defense of Federal preemption to pass. It did not, however, want the jury to consider this damaging evidence. It, therefore, filed a motion in limine seeking to bar the introduction of the above-referenced documents and testimony. Honda argued that, since

"no-airbag" claims were preempted, the Montags should be precluded on preemption grounds from introducing any evidence referring to airbags.

The district court granted Honda's motion and precluded Petitioners from offering evidence of the safer and economically feasible alternative design that Honda had considered—the airbag and manual body-mounted belt combination. This meant that the documents produced by Honda and video testimony of Honda's in-house engineers had to be edited to eliminate any reference to airbags. For instance, the jury did not hear Mr. Hashimoto's testimony that Honda's documents stated that: ". . . the ideal system is [an] airbag plus the 3-point belt." However, the jury did hear Mr. Hashimoto's testimony that the vehicles equipped with door mounted automatic belt system were "perfect products."

The Montags did not contend that an airbag would have made a difference in this crash. The district court's preemption ruling, however, effectively precluded the Montags from proving their case. Under Colorado law, it was the Montags' burden to prove there were safer, economical alternatives to the automatic safety belt system selected and designed by Honda, but the court's ruling prevented the Montags from mentioning the safest, most effective alternative Honda had considered—the 3-point body-mounted seatbelt with an airbag.

Moreover, since a system containing an airbag is the only system with a body-mounted 3-point seatbelt that Federal motor vehicle safety standard 208 identifies as an acceptable passive restraint system, the district court's order left Honda

free to falsely inform the jury—without fear of contradiction—that the system it chose was the safest passive restraint system that complied with Federal law. Thus, beginning with its opening statement, and extending into the testimony of its experts and in-house engineers, Honda repeatedly misinformed the jury that the system in Mrs. Montag's car was "the best" and/or "the safest" system available to meet the requirements of FMVSS 208. Honda made these misrepresentations knowing full well that the trial court's ruling on the motion in limine prevented the Montags from revealing the truth.

The jury specifically found that Mrs. Montag's injuries were caused by her ejection from her vehicle. Given the court's limitation of evidence of alternative systems permitted and given the jury instructions regarding Colorado's presumption of non-negligence and non-defectiveness where Federal standards have been met, the jury inevitably concluded that the door mounted safety belt was not defectively designed (presumably because it met FMVSS 208) and that Honda was not negligent in designing the door mounted safety belt system.

Petitioners appealed to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit did not analyze the effects of the holdings of *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d. Cir. 1986), *rev'd in part and aff'd in part*, 112 S. Ct. 2608 (1992); and *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), on its previous decision in *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied* 494 U.S. 1065 (1990). Nor did it mention the recent decisions of the New Hampshire Supreme Court and the

Supreme Court of Indiana rejecting both express and implied preemption of "no-airbag" claims. *Ford Motor Co. v. Tebbetts*, 165 A.2d 345 (N.H. 1995), *cert. denied* 116 S. Ct. 773, *rehrg. denied* 116 S. Ct. 1036 (1996); and *Wilson v. Pleasant and General Motors Corp.*, 660 N.E.2d 327 (Ind. 1995). It simply held that *Kitts* remained good law and that an implied preemption analysis excluded airbag evidence.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DECISIONS OF NUMEROUS FEDERAL CIRCUITS AND STATE COURTS OF LAST RESORT, WHICH HOLD THAT COMPLIANCE WITH MOTOR VEHICLE SAFETY STANDARDS DOES NOT EXEMPT THE MANUFACTURER FROM LIABILITY UNDER COMMON LAW.

The decision below should be reviewed because it directly conflicts with the decisions of numerous Federal circuits and state courts of last resort, presenting an issue that Honda and its fellow auto manufacturers have already urged this Court to hear. A brief review of the cases interpreting the Safety Act's preemptive effect demonstrates the aberrant nature of the Tenth Circuit's decision.

The Safety Act was enacted in 1966. For the next twenty years, eight Federal appeals courts and five state courts of last resort addressed the issue of whether compliance with Federal motor vehicle safety standards exempts automobile

manufacturers from liability in design cases. They each reached the same conclusion: Congress' words mean what they say:

> [c]ompliance with any Federal motor vehicle safety standard . . . does not exempt any person from any liability under common law.

15 U.S.C. § 1397(k).[3]

In 1986, however, the Third Circuit issued its since rejected decision in *Cipollone v. Liggett Group, Inc.*, *supra.*, expanding the implied preemption doctrine to find certain common law claims involving cigarettes preempted despite Congress' intent to the contrary. Within a year, the First and Eleventh Circuits issued similar decisions. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987).

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[3]*See Knippen v. Ford Motor Co.*, 546 F.2d 993, 1000 (D.C. Cir. 1976); *Dawson v. Chrysler Corp.*, 630 F.2d 950, 957-58 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Stonehocker v. General Motors Corp.*, 587 F.2d 151, 156-57 (4th Cir. 1978); *Dorsey v. Honda Motor Co. Ltd.*, 655 F.2d 650, 656-57 (5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982); *Shipp v. General Motors Corp.*, 750 F.2d 418, 421 (5th Cir. 1985); *Sours v. General Motors Corp.*, 717 F.2d 1511, 1516-17 (6th Cir. 1983); *Schwartz v. American Honda Motor Co., Inc.*, 710 F.2d 378, 383 (7th Cir. 1983); *Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968); *Fox v. Ford Motor Co.*, 575 F.2d 774, 778 (10th Cir. 1978); *General Motors Corp. v. Edwards*, 482 So.2d 1176, 1198 (Ala. 1985); *Volkswagen of America, Inc. v. Young*, 272 Md. 201, 321 A.2d 737, 746 (Md. App. 1974); *H.P. Hood & Sons, Inc. v. Ford Motor Co.*, 370 Mass. 69, 345 N.E.2d 683, 688 (1976); *Arbet v. Gussarson*, 66 Wis.2d 551, 225 N.W.2d 431, 438 (1976).

Before this Court had an opportunity to overturn these decisions, the erroneous implied preemption analysis adopted in the cigarette cases was applied by Federal appeals courts to the interpretation of the Safety Act. In 1988, the First Circuit heard *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988). The First Circuit explicitly adopted the rationale of *Palmer*, its recent cigarette labeling decision, and became the first appeals court in the nation to find a common law claim of automobile products liability impliedly preempted by the Safety Act despite Congress' clear statement of anti-preemptive intent. *Wood*, *supra.* at 410-11. In the next three years, the Third, Tenth, and Eleventh Circuits (and several lower courts) followed, issuing other implied preemption decisions, including *Kitts v. General Motors Corp.*, *supra.*

In 1992, this Court issued its decision in *Cipollone* explicitly rejecting the Third Circuit's expansion of the implied preemption doctrine. In a portion of the opinion, joined by seven members, this Court said:

> In our opinion, the preemptive scope of the [two statutes at issue] is governed entirely by the express language in . . . each act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from substantive provisions of the legislation. Such reasoning is a variant of the familiar principle of *expression unius est exclusio*

alterius: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted.

112 S. Ct. at 2618.[4]

Cipollone's clarification of the limits of implied preemption analysis effectively invalidated the decisions finding implied preemption under the Safety Act. Since *Cipollone*, two Federal courts of appeals and three state courts of last resort have considered the Safety Act's preemptive effect on common law claims. Only the Tenth Circuit has found implied preemption.

The first such case was *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994), *aff'd sub nom. on other grounds, Freightliner Corp. v. Myrick, supra.* The Eleventh Circuit held that *Cipollone* negated its prior implied preemption decision in *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), and that the Safety Act expressly preserved the common law claims at issue. Upon review, this Court unanimously affirmed. While it said that the Eleventh Circuit had misread

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[4]In language particularly relevant to preemption analysis under the Safety Act, this Court added: "[T]here is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions. For example, in the Comprehensive Smokeless Tobacco Health Education Act of 1985, Congress expressly pre-empted state or local imposition of a 'statement relating to the use of smokeless tobacco products and health' but, at the same time, preserved state law damages actions based on those products." *Id.* (footnote omitted).

Cipollone to hold that implied preemption is barred wherever Congress includes an express preemption clause in a statute, *Myrick* at 1487, it went on to note that the presence of a preemption clause may support an inference foreclosing an implied preemption analysis. It found it unnecessary, however, to address the Eleventh Circuit's holding that, under *Cipollone*, § 1397(k) constitutes a "reliable indicium of Congressional intent" such that it precluding a finding of implied preemption under the Safety Act. Instead, it affirmed the Eleventh Circuit's finding of no preemption on the ground that there was no relevant Federal motor vehicle safety standard in effect. *Id.* at 1485-88.

The Eleventh Circuit recently reaffirmed that its holding in *Myrick v. Freuhauf Corp., supra.*, is still good law in that circuit:

> Since the district court's decision, this circuit has expressly held that standards promulgated under the National Traffic and Motor Vehicle Safety Act do *not* preempt common law claims. [citations omitted] The Supreme Court recently affirmed this circuit's decision. [citations omitted]

Doyle v. Volkswagenwerk Aktiengelellschaft, ____ F.3d ____ (11th Cir. April 24, 1996) (emphasis in original).

The Supreme Court of Arizona also considered the Safety Act's preemptive effect after this Court decided *Cipollone*, but before this Court decided *Myrick*. Relying in part on the Eleventh Circuit's decision in *Myrick*, the Supreme

Court of Arizona unanimously held in *Hernandez-Gomez v. Volkswagen of America, Inc.*, 884 P.2d 183 (Az. 1994), *vacated and remanded*, 115 S. Ct. 1819 (1995), that the Safety Act does not preempt a state common law claim against a manufacturer for failing to incorporate a lap belt into its passive restraint system. After this Court issued its decision in *Myrick*, it vacated the Arizona Supreme Court's decision in *Hernandez-Gomez* and remanded that case for reconsideration in light of its ruling.

The Arizona Supreme Court has recently announced its decision on rehearing finding no preemption of state tort law claims by the Safety Act. *Hernandez-Gomez v. Volkswagen of America, Inc.*, ____ P.2d ____ (Az. May 14, 1996).

The Supreme Court of New Hampshire, in *Ford Motor Co. v. Tebbetts*, *supra.*, was the first state court of last resort or Federal circuit to address the Safety Act's preemptive effect after this Court's decision in *Myrick*. Following the analysis suggested by the *Myrick* opinion, it found that state common law is not expressly preempted by the Safety Act. It then went on to examine whether the Safety Act and/or its history provided a "reliable indicium of Congressional intent with respect to State authority." Based upon this Court's clarification of the preemption analysis set forth in *Cipollone* and *Myrick*, the New Hampshire Supreme Court held that the preemption clause, when read in conjunction with the savings clause, provided a reliable indicium of Congressional intent with respect to state authority leading to the conclusion that there is no need to infer Congressional intent to preempt state law.

The Supreme Court of Indiana was the next high court to consider this issue, in *Wilson v. Pleasant and General Motors Corp., supra.* Engaging in an exhaustive analysis of the effect of *Myrick* and *Cipollone*, it found no preemption stating:

> [W]e hold that in the § 1397(k) savings clause of the Safety Act, Congress made an explicit statement that the kind of state common law claim made by plaintiff in this case is not preempted by the Safety Act or standards promulgated thereunder. And while fully subscribing—as we must—to *Myrick's* teaching that an express preemption clause does not as a rule foreclose implied preemption, for the reasons set forth above, we hold that the § 1397(k) preemption clause entirely forecloses any possibility of implied preemption in this case.

Id. at 336.

The Indiana Supreme Court also went on to analyze the case under an implied preemption analysis even though it had ruled that such an analysis was not necessary. In concluding that implied preemption would not bar the plaintiff's claim, the court stated:

> After examining the stated purposes and policies of the Safety Act, the statutory language at issue, and the legislative and regulatory history, we are convinced that Congress was focused first and foremost on "reducing traffic deaths and injuries and deaths and injuries to

> person resulting from traffic accidents" and that its strategy was to pursue those purposes both through federal regulations and state common law. Because compliance with Rule 208 and recognition of plaintiff's claim here is not "physically impossible" and because recognition of the claim here does not stand "as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress"—indeed, we believe it furthers them—we find no basis for implying preemption of plaintiff's claim.

Id. at 339.

In the last ten years, there have been well over 150 lower court decisions addressing preemption questions similar to those presented by this case. The split among these decisions is broad, growing, and irreconcilable. Indeed, the Superior Court of Pennsylvania noted in *Cellucci v. General Motors Corp.*, ____ A.2d ____ (Pa. Super. Ct. April 30, 1996), that the ultimate answer to this question must be provided by the Supreme Court.

The adverse consequences of the conflict between the courts on this issue are considerable for consumers and injured persons throughout the country. Whether injured persons may seek compensation for injuries caused by these dangerously designed products depends on the state in which the claim is brought, and in some states, whether the claim is brought in a state or Federal court in the same locale. The conflict undermines the purposes of the Safety Act and the Department of Transportation in establishing the FMVSS to "reduce traffic

accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381.

Indeed, Honda and its fellow auto manufacturers have already urged this Court to review the issue presented in this case. In December, 1995, Honda (as a member of the Association of International Automobile Manufacturers) argued to this Court that leaving the question of the scope of Federal preemption under the Safety Act unresolved would have "devastating consequences" (*Ford Motor Co. v. Tebbetts*, Brief of The American Automobile Manufacturers Association and the Association of International Automobile Manufacturers, Inc., as *amici curiae*, at Page 2). Honda's *Amici* Brief said:

> Litigation over the preemptive effects of FMVSS 208 has proceeded for a decade, with no end in sight. The lower courts are hopelessly divided, and the decision below . . . is certain to encourage further tort suits. Only this Court can put an end to this controversy.

Ford Motor Co. v. Tebbetts Amicus Brief, Page 20.

We agree. This Court should resolve this conflict now, not wait for still more disagreements among the lower courts.

II. THE DECISION BELOW DIRECTLY CONFLICTS WITH CONGRESS' EXPRESS STATEMENT OF INTENT THAT "COMPLIANCE WITH A FEDERAL MOTOR VEHICLE SAFETY STANDARD . . . SHALL NOT

EXEMPT ANY PERSON FROM ANY LIABILITY UNDER COMMON LAW."

The decision below should also be reviewed because it directly conflicts with Congress' clear and unequivocal preservation of common law claims in the Safety Act. The Tenth Circuit's abrogation of the power of the states to provide for compensation of their actions—in direct contravention of Congress' statement of intent—should not be permitted.

There is a strong presumption against preemption. This presumption derives from the principles of federalism and the core values of the Tenth Amendment. As this Court has repeatedly stated, preemption analysis "start[s] with the assumption that the historical police powers of the States [are] not to be superseded by . . . [the] Federal act unless that [is] the clear and manifest purpose of Congress." *Cipollone*, *supra.*, at 2617 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

In preemption analysis, as with most other matters of statutory construction:

> If the statute contains an express preemption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause which necessarily contains the best evidence of Congress' preemption intent.

CSX Transportation v. Easterwood, 113 S. Ct. 1732, 1737 (1993).

Most importantly, the courts must "fairly but—in light of the strong presumption against preemption—narrowly construe the precise language" of preemption provisions. *Cipollone*, *supra.*, at 2621.

The preemption language of 15 U.S.C. 1392(d), narrowly construed in light of the presumption against preemption, does not expressly preempt common law claims. *See*, *Wood v. General Motors Corp.*, *supra.*; *Kitts v. General Motors Corp.*, *supra.* The preemption provision merely prohibits a State from establishing or continuing in effect a "safety standard" that conflicts with a "Federal motor vehicle safety standard" established under the Act. "Safety standard" is a term used throughout the Act to refer to the administrative standards that the Secretary is authorized to adopt pursuant to the Act. A word is presumed to have the same meaning in all subsections of the same statute. *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992); *Morris-Knudsen Const. v. Director, Office of Worker's Comp Programs*, 461 U.S. 624, 633 (1983). The only sensible reading of the Safety Act's preemption provision is that a "safety standard" promulgated under the Act will only preempt a State legislative or administrative "safety standard" that is not identical to the Federal standard.

If any doubt remains to the inapplicability of the Safety Act's express preemption provision to common law claims, it is dispelled by the Safety Act's express anti-preemption provision—the savings clause—which unambiguously preserves all common law claims:

> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

15 U.S.C. § 1397(k).

The savings provision is sweeping and unambiguous. Congress wrote the savings clause to do what it says: to preserve all common law claims.

That decision was hardly shocking. Congress wanted the Federal government to set minimum performance standards, but wanted the common law tort system to continue its traditional role of compensating injury victims and creating incentives for design improvements. Indeed, when it added the savings clause to the Safety Act, the U.S. House of Representatives made this point crystal clear. It said:

> It is intended and this subsection [§ 1397(k)] which specifically establishes, that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those related to warranty, contract, and tort liability.

H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966).

This Court's holding in *Cipollone* makes it clear that where Congress has spoken directly and clearly on the preemption issue at stake, as it did in the Safety Act, the courts should not turn to implied preemption. This Court's decision in *Freightliner v. Myrick*, *supra.*, does not alter this

conclusion—as the recent decisions in *Tebbetts*, *Wilson*, and *Hernandez-Gomez* demonstrate. In this case, Congress' plainly expressed intent is to preserve, rather than preempt, common law claims. The decision of the Tenth Circuit simply ignores Congress' intent.

Even if the implied preemption analysis were proper here, there would be no implied preemption because neither the Montags' claims nor the evidence the Montags sought to introduce conflict with the Safety Act or NHTSA's regulations. As in *Myrick*, "it is not impossible for [Honda] to comply with both Federal and State law . . .," supra. at 1488. Honda could have met both the performance requirements of the Safety Act and the common law requirement that the product be safe. In selecting a passive restraint system, Honda was not limited (as it told the jury it was) to systems which automatically release the occupant when a door opens during a collision. It was possible for Honda to meet both the passive frontal crash protection requirements of Standard 208 and provide protection from ejection during accidents where the door opens.

Further, the Montags' claims do not "frustrate the accomplishment and execution of the full purposes and objectives of Congress." *Myrick*, *supra.*, at 1488 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Ejection protection is perfectly consonant with the purposes and objectives of both Congress in enacting the Safety Act and NHTSA in promulgating FMVSS 208. There was absolutely no safety advantage to the Honda 3-point door mounted system over systems which would prevent ejection when used as designed by the manufacturers.

Honda has argued that failure to apply Federal preemption would destroy the uniformity that the Safety Act is supposedly meant to achieve. This is an interesting position given Honda's fierce defense of its right to select the various "options" available under FMVSS 208. The Montags presentation of evidence regarding how Honda exercised that option does not disturb the ability of manufacturers to choose among restraint options since, whatever option they choose, that option must be implemented in a reasonably safe manner. Indeed, what is most shocking about the decision below is that it directly contravenes both Congress' plain words and the clear statement of the Secretary of Transportation in promulgating the relevant version of Standard 208 in 1984. When confronted with the criticism that manufacturers would use the cheapest system to comply with the automatic restraint system requirement, Secretary of Transportation Elizabeth Dole replied:

> The Department does not agree with this contention. It believes that competition, potential liability for any deficient systems, and pride in one's product would prevent this. *(emphasis added)*

49 Fed. Reg. 29000 (1984).

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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